

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

STATE OF OHIO,	:	APPEAL NO. C-090869
Plaintiff-Appellee,	:	TRIAL NOS. B-0902968
vs.	:	
QUINTON SCOTT,	:	<i>JUDGMENT ENTRY.</i>
Defendant-Appellant,	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.¹

Defendant-appellant Quinton Scott was found guilty following a jury trial of aggravated robbery, robbery, two counts of felonious assault, one count of having weapons while under a disability, and two firearm specifications. The trial court sentenced Scott to 34 years in prison. Scott now appeals, raising four assignments of error for our review.

In his first assignment of error, Scott argues that the trial court erred by denying his motion for a mistrial and to strike the testimony of Officer Yvonne Gutapfel. Officer Gutapfel testified that when she had told Scott that he was being arrested for felonious assault, Scott said, “You don’t have the gun, how can you

¹ See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.

charge me with felonious assault?” Scott’s counsel did not object to the testimony. On the next day of the trial, however, Scott’s counsel did request a mistrial and moved to strike the testimony because the statement had not been provided in discovery. The trial court then permitted further questioning about the statement. Gutapfel testified that she had advised Scott of his *Miranda*² rights before he made the statement, and that he had not been cooperative, so he was not questioned further by the police. As a result, the trial court denied Scott’s motion for a mistrial and permitted Gutapfel’s testimony to stand.

Scott argues that the trial court abused its discretion in failing to grant a mistrial. While Crim.R.16(E)(3) permits a trial court to exclude evidence as a sanction for a discovery violation under the rule, a trial court is not required to impose that sanction.³ Instead, it must impose the least severe sanction that is consistent with the purpose of the rules of discovery.⁴ Here, Scott’s counsel sought the most stringent sanction available for a Crim.R. 16 violation. Scott’s counsel did not object to Officer Gutapfel’s testimony, nor did he seek a continuance, which would have arguably remedied any resulting harm. We further conclude that the trial court’s admission of the undisclosed evidence was not reversible error. While the prosecutor’s failure to turn over the statement in this case was arguably willful, Scott cannot show that the pretrial disclosure of the statement would have benefitted his defense or that he was unfairly prejudiced by the statement’s admission.⁵ Scott knew about this evidence. It was his statement. And any motion to suppress his statement would have been denied, as was made evident by Gutapfel’s additional

² (1966), 384 U.S. 436, 86 S.Ct. 1602.

³ *State v. Otte*, 74 Ohio St.3d 555, 563, 1996-Ohio-108, 660 N.E.2d 711.

⁴ *State v. Parker* (1990), 53 Ohio St.3d 82, 86, 558 N.E.2d 1164.

⁵ *State v. Scudder* (1994), 71 Ohio St.3d 263, 268, 643 N.E.2d 524.

testimony, which was how the trial court chose to address the Crim.R. 16 violation. As a result, we overrule Scott's first assignment of error.

In his second assignment of error, Scott argues that he was denied the effective assistance of counsel guaranteed by the Sixth Amendment, because defense counsel did not ask the trial court to review in camera the grand-jury testimony of the victim, John Blake, and the state's other eyewitness, Brian Bledsoe.

But as the state points out, Bledsoe did not testify before the grand jury, and neither Blake nor Bledsoe made any written or recorded statements that the court could have reviewed. Furthermore, we have reviewed Blake's grand-jury testimony and find no material inconsistencies with his trial testimony. Because Scott cannot show that the result of his trial would have been any different had defense counsel sought the in camera review of Blake's testimony, we overrule his second assignment of error.⁶

In his third assignment of error, Scott argues that his convictions were based on insufficient evidence and were against the manifest weight of the evidence. Our review of the record, however, shows that a rational trier of fact, after viewing the evidence in a light most favorable to the prosecution, could have found that the state had proved beyond a reasonable doubt all the elements of aggravated robbery, robbery, the two counts of felonious assault, the one count of having weapons while under a disability, and the accompanying firearm specifications. Thus, the evidence was sufficient to support the convictions.⁷ Moreover, we cannot conclude that the trier of fact lost its way and created such a manifest miscarriage of justice that we

⁶ *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373, paragraph two of the syllabus.

⁷ *State v. Thompson*, 78 Ohio St.3d 380, 386, 1997-Ohio-52, 678 N.E.2d 541.

must reverse Scott's convictions and order a new trial.⁸ We, therefore, overrule his third assignment of error.

In his fourth assignment of error, Scott argues that the trial court erred as a matter of law by improperly sentencing him for the two counts of felonious assault, and by imposing consecutive sentences in violation of *Oregon v. Ice*.⁹

In this case, the trial court's imposition of separate sentences for the two felonious-assault counts was not contrary to law. Although both counts charged the violations of the same statute, R.C. 2903.11(A)(2), the record reveals that Scott committed two separate acts¹⁰ when he not only tried to shoot Blake with a gun, but then hit Blake with the gun after it would not fire. As a result, we reject Scott's argument that the separate convictions and sentences for the two counts of felonious assault were improper.

We also reject Scott's argument that the trial court's imposition of consecutive sentences violated *Oregon v. Ice*. Scott did not raise this issue before the trial court.¹¹ But even if he had, any reexamination of the *Foster*¹² decision, following the United States Supreme Court's decision in *Oregon v. Ice*, can only be undertaken by the Ohio Supreme Court.¹³ Until that time, we cannot depart from the Ohio Supreme Court's pronouncements in *Foster*.¹⁴ As a result, we overrule Scott's fourth assignment of error and affirm the judgment of the trial court.

⁸ Id. at 387.

⁹ (2009), ___ U.S. ___, 129 S.Ct. 711.

¹⁰ R.C. 2941.25(B).

¹¹ See *State v. Elmore*, 122 Ohio St.3d 472, 2009-Ohio-3478, 912 N.E.2d 582, at fn. 2.

¹² 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470.

¹³ See *State v. McCrary*, 1st Dist. No. C-080860. 2009-Ohio-4390, at ¶35.

¹⁴ Id.

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A certified copy of this judgment entry shall constitute the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

HILDEBRANDT, P.J., SUNDERMANN and DINKELACKER, JJ.

To the Clerk:

Enter upon the Journal of the Court on September 17, 2010
per order of the Court _____.
Presiding Judge